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IN THE

Supreme Court of the United States

October Term, 1966

NO. ~~1313~~ 135.

HARVEY C. REGISTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CHARLES FULLER BLANCHARD
8th Floor Wachovia Bank Bldg.
Raleigh, North Carolina

IRVIN B. TUCKER, JR.
8th Floor Wachovia Bank Bldg.
Raleigh, North Carolina

Counsel for Petitioner

COMMERCIAL PRINTING COMPANY, RALEIGH, N. C.

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Harvey C. Register, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on April 15, 1966, in this proceeding.

CITATION TO OPINION BELOW

The original opinion of the Court of Appeals, dated April 15, 1966, has not been reported to date. This opinion appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals is dated April 15, 1966, and was entered on the same date.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether Federal Statute permits a Federal Judge to conduct a hearing without notice to the probationer of the terms of probation that he is charged with violating?

2. Whether Federal Statute permits a Federal Judge to revoke a probation upon evidence that consists entirely of hearsay testimony?

STATEMENT OF CASE

Jurisdiction of the District Court of the Eastern District of North Carolina was invoked because petitioner was charged with violation of a Federal Internal Revenue Act.

On March 5, 1962, the defendant pled guilty to violation of the Internal Revenue Liquor Law and specifically to Title 26 USC, Section 7206(4) on one count and received a sentence of three years and a fine of $750. The execution of the prison sentence was suspended and the defendant placed on probation for a period of five years under general conditions as recorded in the Clerk's office and a special condition that he pay the sum of $375 on or before April 5, 1962, and the remaining $375 on or before October 1, 1962. Appellant's appendix p. 1A.

On September 10, 1965, a hearing was had in Clinton, N. C., before the Honorable Algernon L. Butler, Chief Judge of the United States District Court for the Eastern District of North Carolina, on the motion of the probation officer for revocation of the probation of the probationer, Harvey C. Register. Appellant's appendix p. 2A.

The probationer had notice that the hearing before Judge Algernon L. Butler, Chief Judge of the United States District Court for the Eastern District of North Carolina, would be held on September 10, 1965, for the purpose of passing upon the motion of the probation officer for revocation of his probation. However the probationer, Harvey

C. Register, did not have any notice of what terms of the probation he was supposed to have violated. Appellant's appendix p. 2A.

The evidence at the hearing of September 10, 1965, was completely insufficient to show any violation of any state or federal law. Appellant's appendix pp. 6A-7A.

Probation Officer Woodard quoted statements that the probationer was alleged to have made to another probation Officer Neely and Probation Officer Woodard alleged them to have been untrue. Mr. Stewart who was representing the probationer at the hearing protested to the court the statement of Mr. Woodard as to what Mr. Neely had reported that the probationer had said to Probation Officer Neely who was present at the hearing and available to the court and stated Probation Officer Neely should be required by the court to make the statement as to what statements the probationer had made to him. However the court allowed Probation Officer Woodard to state to the court statements that Probation Officer Neely had reported that the probationer had made. Probation Officer Neely never personally gave any testimony or report and was never subject to cross-examination by the probationer. Appellant's appendix pp. 7A, 9A, 10A, 11A, 46A.

The court deferred decision on the revocation of probation until September 30, 1965, on which date the Court entered an order that the motion for revocation of probation be allowed in the discretion of the court and that present sentence of three years heretofore imposed was reduced to two years. Appellant's appendix pp. 2A-6A.

Probationer duly filed notice of appeal on November 3, 1965, to the Circuit Court of Appeals for the Fourth Circuit. The Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court stating:

"The revocation of Harvey C. Register's probation was

justified, we think, and on his appeal from the consequent commitment, we affirm.

Chiefly, the grievance asserted by the appellant is the acceptance of certain hearsay testimony by the District Court in regard to his breach of the probationary terms. In this there was no error or infringement of Register's rights, and there was ample evidence without it to sustain the revocation. However, as the trial judge is quite aware, there can be injury if hearsay plays too great a role in the inquiry, and he will constantly be alert to the frequent untrustworthiness of such proof. Of course, the infractions admitted by the probationer may always be outlined for the Court in hearsay statements.

In the argument on appeal the question arose as to the adequacy of the notice to the probationer of the motion or request for revocation. The present order may not be disturbed on this ground, but it is suggested that always, whatever form the notices takes, a specification be included of the grounds upon which revocation will be sought."

Relevant Facts

The general conditions of probation on file with the Clerk of the United States District Court of the Eastern District of North Carolina are as follows: "(a) Refrain from the violation of any state and federal penal laws. (b) Live a clean, honest and temperate life. (c) Keep good company and good hours. (d) Keep away from all undesirable places. (e) Work regularly. When out of work, notify your probation officer at once. (f) Do not leave or remain away from the city or town where you reside without permission of the probation officer. Notify your probation officer at once if you intend to change your address. (g) Contribute regularly to the support of those for whose support you are legally responsible. (h) Follow the probation officer's instructions and advice. The Probation Law gives him au-

thority to instruct and advise you regarding your recreational and social activities. (i) Report promptly on the dates set forth. If for any unavoidable reason you are unable to do so, communicate with your probation officer without delay."

At the hearing September 10, 1965, upon motion of the Probation Officer for revocation of the probationer's probation, the probationer, showed the court by forty-five witnesses and letters, that since March 5, 1962, that the probationer, Harvey C. Register, has borne a good reputation in his community, and that he had worked industriously. The probationer's witnesses and letter writers included a banker, a rural policeman, a department commander of the North Carolina American Legion, a minister, a constable, a deputy sheriff, a special deputy sheriff, numerous business men and housewives. Appellant's appendix pp. 105A-132A, 156A.

Harvey F. Pope, Alcohol Beverage Control Officer from Harnett County, a government's witness, testified that since March, 1962, that he did not have any information concerning the probationer Harvey C. Register's dealing in nontaxpaid whiskey but before March, 1962, he had had information on several occasions. Appellant's appendix pp. 36A-42A. Also the government's witness Ira W. Hatch supervisor of the Alcohol Beverage Control Store in Clinton, N. C., would go no further, in spite of constant leading, than to state that the probationer Harvey C. Register had a reputation in respect to nontaxpaid whiskey to the latter part of 1962. However he explained that the reason that he stated that the probationer had a reputation in respect to nontaxpaid whiskey — was that in December, 1962, they found a big still on some land that the probationer was alleged by other officers to be tending, however, his information was that Carson Webb was the operator of that still and that he did not have any information that it was owned by Harvey Register. Appellant's appendix pp. 44A-45A.

Alcohol and tobacco tax investigator, Arthur R. Bryant testified that along with other officers he seized an unregistered distillery located on the Benny Slaughter property. The distillery itself was located approximately 100 yards from what he described as a tool barn. In the tool barn there were numerous tools and there were twelve cases of one-half gallon fruit jars, ten of which were in Tom's Toasted Peanut containers and were used. There were two paths to the distillery. One path was a little used footpath which led through an old distillery site and the other path was through a freshly plowed field on the Benny Slaughter property. It was impossible to tell in which direction the path went after it came into the field. That Russell Lee was arrested at the distillery where he had brought two cases of the jars that had previously been seen in the barn. Appellant's appendix pp. 11A-16A. The building described as a barn was actually an old dwelling house. Part of the walls were torn out the back. Appellant's appendix p. 24A. Officer Bryant did not know who the tools belonged to. He did not know who put them there. He did not know who was farming the land other than Probation Officer Neely had told the witness Bryant that the probationer Harvey C. Register had told Probation Officer Neely that the farm equipment was his. Appellant's appendix pp. 24A, 25A.

Officer Bryant further testified that he did not know whether the distillery was on the Jessie Tart estate or whether it was on the Benny Slaughter estate. Appellant's appendix p. 20A. Officer Bryant further testified that although he had seen Harvey C. Register in the fields on what he considered to be Benny Slaughter property on several occasions he was always in the field around the tenant house and was always engaged in farming operations and he had never seen him make any overt act toward operating a distillery or having anything to do with any of the distilleries that he had investigated. He had taken

fingerprints and had not discovered his fingerprints on any of the distillery equipment. Appellant's appendix pp. 21A, 22A.

The only evidence that Harvey Register had any access or control over the barn or old building where the farm implement and jars were found was the statement of Probation Officer Woodard that Probation Officer Neely had been told by Harvey Register that the probationer stated that he rented the land for $700 a year, and that he had access to and control over this out-building and stated that he owned the farm machinery that was parked around the building. Appellant's appendix p. 9A.

There was no front door on the old house or barn. It was just so anybody could go in. Appellant's appendix pp. 59A, 60A. The evidence is actually uncontradicted that Charles Pope and James O. Elmore were the only persons farming the land known as the Slaughter place in the year 1965. Charles Pope had the tobacco crop and after the tobacco crop was completed James O. Elmore raised squash. That the probationer tried to raise some corn but had to stop working it because it was too wet to plow it with a tractor. That the tenant house was occupied by Joe Godwin and that the barn or old house was located about a thousand feet from the living quarters on the farm. That after the tobacco had been gathered and the stalks cut, James O. Elmore planted his squash and stored his soda and fertilizer in that old building. That when Elmore went to remove his last soda and fertilizer he saw a number of fruit jars and cases that were broken lying outside the door. Elmore did not see Harvey C. Register around the place prior to the time that he saw the fruit jars broken. Elmore used Harvey Register's tractor some. Harvey Register always parked his tractor up at the house and not at the barn. The jars were not in the barn when Elmore put the fertilizer in there and he did not know whose they were. Appellant's appendix pp. 53A, 56A-59A.

Ed Tart testified that he was one of the Jessie Tart heirs and that his family operated under the name of Jessie Tart Estate and that the Tart estate adjoins the Benny Slaughter property. That the Tart estate consists of property all around the Slaughter estate. The Slaughter land adjoins the Tart land next to the Tart woods and the Slaughter land is cleared on both sides. The Tart land is the woodland. Appellant's appendix pp. 54A-55A. That the only woodland on the Slaughter place is four or five acres on the side which is not to the rear of the house but all to the right of the house when you go in and Tart himself cut the timber off that about six or seven years ago. That all of the woodland back of the house belonged to the Tart estate. That the Slaughter land does not include more than about twenty-five acres and is surrounded by the Tart land. Appellant's appendix p. 55A.

Leon S. Smith of the Wake County Alcoholic Beverage Control testified that on December 17, 1962, he saw two persons loading cardboard boxes, labeled Lamb and that some of them could have been labeled Kerr, at Griffin's Supermarket located on the Old Wake Forest Road just north of Raleigh. The boxes were loaded on an Ace Rental Truck. Smith further testified that the truck left Griffin's Supermarket and went east in the direction of U.S. Highway 64 and stopped at Beacon Lake where there was a barbecue stand and where the probationer was parked in a 1959 or 1960 blue Chevrolet. Smith further testified that Register went to the driver of the truck and had a conversation with him and immediately the truck left going east on Highway 64. Smith further testified that ABC Officers with the aid of radio-equipped cars and an airplane followed the truck to Selma and then to Newton Grove. At Newton Grove the truck was parked on a street at a Pure Oil Station and the driver got out and got into a 1959 or 1960 Chevrolet and the officers did not follow the truck or the Chevrolet anymore and do not know where either went from that location.

Smith further testified that he had the license number of the 1959 or 1960 Chevrolet identified through the Motor Vehicles Department as being registered to Dorothy Register. He further testified that the 1959 or 1960 Chevrolet stayed within sight of the truck most of the way from Beacon Lake to Newton Grove. Appellant's appendix pp. 30A-36A.

Officer Smith further testified that he did not know what was in the boxes on the truck. That all the roads that he had described were public roads and no charges had been preferred against Harvey C. Register since he has been on probation and that he did not see any violation in the Chevrolet. Appellant's appendix pp. 34A-35A.

Probation Officer Woodard over the protest of Attorney Stewart was allowed by the court to state that Probation Officer Neely had reported that in a conversation between Neely and probationer Register on February 5, 1963, the probationer denied any knowledge of the jars on the truck and said that his presence in Four Oaks was a mere coincidence. That he and his wife had been on a shopping tour to Wilson and that they just happened to be in Four Oaks at the time the jars went through. Appellant's appendix p. 46A. Probation Officer Neely was present at the hearing.

William C. Terrell investigator for alcohol and tobacco tax testified that on March 17, 1965, that he went to Register's Four-Way Grocery that the probationer was there and that he found 42 60-pound bales of sugar and 86 cases of used half-gallon jars on hand at the store. That there were twelve jars to a case and that 60-pound bales usually come in five or ten pound bags. That he could not determine how many were five-pound bags and how many were ten-pound bags. That the majority of the jars had "Tom's Toasted Peanuts" on the cases that they were in. Appellant's appendix pp. 26A-28A.

Investigator Terrell further testified that when he arrived at the store the probationer Register was there talking to

someone in a car and stated that he had nothing to do with the store. Mr. Seth Stewart was inside the store and stated that he was the manager. When the officers came out of the store the probationer Harvey C. Register had left. Appellant's appendix pp. 26A-28A. Arthur R. Bryant investigator for alcohol and tobacco tax testified that on April 12, 1965, demand letters were served on Harvey C. Register, Mrs. Myrtle Register, and Mrs. Dorothy Register in whose name the license to the store was listed. Appellant's appendix p. 13A.

Mrs. Dorothy Register wife of the probationer testified that from January through March, 1965, that she and Myrtle Register were the owners of the store and that Seth Stewart was the manager. That she borrowed $1,200 from the First-Citizens Bank in Benson and out of that loan made a $1,000 down-payment to Mrs. Pauline Tart. The probationer Harvey C. Register took no part in operating the store except that he would go down there with her sometimes on Sunday because she was afraid to stay in the store by herself. He would help her out on the gas customers. Appellant's appendix pp. 60A-61A.

Mrs. Register stated that the probationer never did sell any sugar out of the store to her knowledge, and that Seth Stewart did all of the buying. That she did not ever sell any sugar to any known bootlegger. That no effort was made to conceal any purchases that were made. That Mr. Stewart told her that he had purchased the used jars from colored people thinking that maybe somebody would want to buy them since the store was a country store. That she did not sell any jars to any known bootlegger. That after the demand letter was served on her she did not sell any amount of sugar more than five pounds. Five pounds was the limit that she could sell without making a report. She felt that it would hurt her business to take down the license number of people she sold to and therefore she did not sell more than five pounds. That Probation Officer Neely had

told her that she should get rid of the jars even if she had to break them. After Mr. Neely told her that she instructed Mr. Stewart to never buy another used jar or any half-gallon jars. She told Mr. Stewart to get rid of the jars and does not know what he did with them. Appellant's appendix pp. 62A-66A. Mrs. Register further testified that Mr. Tom Holly had a store that went out of business and had a lot of stuff stored at her place including jars. Appellant's appendix pp. 65A, 66A.

Mrs. Register further stated that to her knowledge her husband had not been involved in the liquor business within the last three years. That he was tending 225 acres of land and raised tobacco, cotton and some corn and worked at his farm work from 4:30 to 5:00 in the morning and to 8:00 to 10:00 at night when the season permitted. And if he was not working he was at home. Appellant's appendix pp. 64A-65A.

The Court allowed Probation Officer Woodard to state that Probation Officer Neely had stated that probationer on February 8, 1965, had stated to Probation Officer Neely that he and his first cousin Atlas Register had recently purchased the stock in a country store in Sampson County and that each man had invested $3,000 in the business. That on March 18, 1965, Probation Officer Neely stated that Probationer stated to him that he planned to sell sugar on hand through legitimate channels and in regards to the jars probationer said that some colored children picked up the jars in the neighborhood and that he bought the jars from them and that on April 6, 1965, the probationer and his wife declined to say what happened to the jars and insisted that the second-hand jars that were found in the store on March 17, 1965, were purchased one jar at a time, from colored boys who went around the countryside picking them up. Appellant's appendix pp. 6A-8A.

Probation Officer Woodard stated to the court that his

records disclose that probation Officer Neely visited Miss Vera Lee an old maid sister of Russell Lee on August 18, 1965, and that Miss Vera Lee had stated to probation officer Neely that the probationer Harvey. Register came to her home about a month prior to August 18, 1965, and called Russell Lee outdoors and engaged in a lengthy conversation with him. Whereas Probation Officer Woodard stated that Probation Officer Neely stated in his report that the probationer denied to him on August 19, 1965, that he had visited Russell Lee where his old maid sister now lives within the past twelve months. Appellant's appendix pp. 9A-10A.

Probation Officer Woodard also stated to the court that probation officer Neely stated that the probationer on August 19, 1965, stated to Probation Officer Neely that Russell Lee dealt directly with the heirs of the Jessie Tart estate in connection with renting the dwelling that he was living in at that time. However Probation Officer Woodard stated that the Probation Office record stated that Probation Officer Neely had stated that on August 25, 1965, Probation Officer Neely went to the office of the Tart Estate where probation Officer Neely was told by a Mrs. Westbrook that Harvey C. Register had accompanied Russell Lee when the rental was negotiated and that at such time Harvey C. Register did all the talking and that Russell Lee was to take care of the rent. Appellant's appendix pp. 10A-11A.

Officer Arthur R. Bryant testified that since January 5, 1965, that he had received numerous reports from reliable sources regarding distilleries which informers stated were owned by the probationer and that a high percentage of those were from sources that had proved to be reliable in the past and since. Appellant's appendix p. 17A. However on cross-examination Mr. Bryant stated that he had no knowledge that Probationer Register had been arrested for anything since he had been on probation. That he had never seen him at a still. That he had investigated numerous reports

concerning Harvey C. Register where he did not find what had been reported to him. That most of his information comes from sources that have a reputation for dealing in liquor. Appellant's appendix pp. 18A-20A.

A.T.T. Investigator William C. Terrell testified that the probationer had a reputation in the community in which he lives for being a wholesaler of nontaxpaid whiskey on a large scale since March, 1962. Appellant's appendix p. 29A. However on cross examination he admitted that he had checked out reports and had never seen the probationer violating any liquor laws since he had been investigating in any manner in which he could prove a violation and that he had not inquired in the community in which probationer lived concerning his reputation. Appellant's appendix pp. 29A, 30A.

There is no evidence that any bootlegger had been seen in the company of the probationer or at his house or at the store operated by his wife, or that he had been seen to be associating with any person who could be classified as bad company.

REASONS FOR GRANTING WRIT

The decision of the Circuit Court of Appeals raised important and disturbing questions of federal law which have not been, but should be, settled by this court.

(1) The Federal Statute does not allow a Federal Judge to conduct a hearing without notice to the probationer of the terms of the probation that he is charged with violating and thereafter revoke his probation.

The probationer's probation was revoked under authority of 18 USC 3653, which in the last paragraph thereof reads as follows:

> "As speedily as possible after arrest the probationer shall be taken before the court for the district having

> jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and if imposition of sentence was suspended, may impose any sentence which might originally have been imposed."

The above named statute was formerly 18 USC 725 which provided that upon arrest of a probationer "such probationer shall forthwith be taken before the court." While 18 USC 725 was still in full force and effect, the Fourth Circuit Court of Appeals in the case of *Hollandsworth v. United States*, 34 F. 2d 423, held that a probationer could not be sentenced until he had been given notice of the specific charge and an opportunity to be heard in his defense. In *Furrow v. United States*, 46 F 2d 647, the Fourth Circuit Court of Appeals held that the notice did not have to be in writing.

This court in *Burns v. United States*, 287 US 216 and in *Escoe v. Zerbst*, 295 US 490, while former statute 18 USC 725 was still in force and effect, construed the provision "Such probationer shall forthwith be taken before the court" to not require "formal" notice or specification of charges without specifically overruling *Hollandsworth v. United States*, supra.

It is respectfully submitted that in the case of *Burns v. United States*, supra, there was actually no question of notice involved and in the case of *Escoe v. Zerbst*, supra, the sole question involved was whether the probationer was entitled to a hearing. In the case of *Burns v. United States*, supra, the court said:

> "There is properly speaking no question here of notice . . . "

All that *Burns v. United States*, supra, did actually say was that the notice or specification of charges need not be formal. For this court said:

> "The question, then, in the case of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges."

Congress did not change the word "forthwith" in the statute as formerly written to "speedily" as now written without intent to make a change in the requirements of the statute. It is submitted that Congress in making this change intended that the summary nature that was inherent in the words "that the probationer shall forthwith be taken before the court" no longer be included in the statute and since no decision of this court has been rendered on the question of notice since *Burns v. United States,* supra, and *Escoe v. Zerbst,* supra, it is important not only to the petitioner but to others that this court re-examine these two decisions in reference to their applicability to Title 18 USC 3653 and establish a guiding rule as to notice to the probationer of the terms of the probation that he is charged with violating prior to hearing.

It is respectfully submitted that the decisions of *Burns v. United States,* 287 US 216 and *Escoe v. Zerbst,* never were intended to infer that the probationer was not entitled to notice of the charges against him which would be adequate to allow the probationer to explain away the accusation. The cases have merely held that formal notice was not necessary and in the case of *Escoe v. Zerbst,* the court said:

> "Clearly the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation."

The court further said:

> "When a hearing is allowed but there is error in conducting it or in limiting its scope, the remedy is by appeal."

The probationer had no notice whatsoever of the terms of the probation that he was charged with violating and at

the hearing on September 10, 1965, statements were made that were intended to show violations dating from December 17, 1962, through August, 1965.

It is respectfully submitted that the probationer could not be fairly expected to make an explanation as to all these charges covering an extensive period of time. However, the U. S. Attorney in the Government's brief on appeal to the Circuit Court and on oral argument contended that the failure of the probationer to testify should be used against him.

In the petition to this Court of Graham Bobbitt Ball for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, presently pending and numbered 1249, petitioner Ball undertook to make a statement to the same court that revoked this petitioner's probation. Petitioner Ball got his facts mixed up because of lack of opportunity to refresh his recollection and his probation was revoked.

In the Ball petition it is evident that lack of notice caused him to make error in his statement. In this petition now before this court the petitioner, like Ball, had no notice of the charges and no opportunity to prepare his answer and, unlike Ball, made no statement but was faced on appeal with the government's argument that his failure to make a statement should be held against him.

The suggestion of the Circuit Court that specification of the grounds upon which revocation will be sought be included in the notice is of absolutely no value to this petitioner or to others, since it is only a recommendation and not a guiding rule to be followed in the future.

The decision of the court below completely disregarded the petitioner's right to a sufficient notice of the charges against him and in order to preserve the petitioner's right which has been disregarded and to decide an important question of federal law which has not been, but should be settled by this court, a review of the decision below is a requisite.

(2) The Federal Statute does not permit a Federal Judge to revoke a probation upon evidence that consists entirely of hearsay.

In the case of *Escoe v. Zerbst,* 295 US 490, this court said:

> "Clearly the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation. The charge against him may have been inspired by rumor or mistake or even downright malice. . . It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper Ibid. That much is necessary, or so the Congress must have thought to protect the individual against malice or oppression."

However, a guiding rule has not been established by this Court that would require the trial judge to at least base his decision upon some evidence other than hearsay and it is important not only to petitioner but to others that a guiding rule be established. It is respectfully submitted that because of the absence of a guiding rule in the foregoing decision and also *Burns v. U. S.,* 287 US 216, the court of appeals affirmed the judgment of the District Court and in effect decided erroneously that under Title 18 USC 3653, that a Federal Judge may revoke a probation upon evidence that consists entirely of hearsay evidence.

The petitioner submits that this court in *Burns v. U. S.,* supra and in *Escoe v. Zerbst,* supra, never intended that the discretion of the Federal Judge in the revocation of probation should not be based on some evidence other than hearsay.

The Court below failed to establish any guiding rule that will prevent the revocation of a probationary sentence upon hearsay alone, but contented itself with an admonition to the trial judge to the effect that there can be injuries if

hearsay plays too great a role in the inquiry and that the trial judge "will constantly be alert to the frequent untrustworthiness of such proof."

Not only does this admonition contained in the opinion fail to establish a guiding rule but as far as the petitioner is concerned the effect of the decision is to allow a revocation of the petitioner's probation entirely upon hearsay evidence.

There is absolutely no evidence that the probationer has failed to keep good company and good hours. There is absolutely no evidence that the probationer did not work regularly. There is absolutely no evidence that he ever remained away from the city or town where he resided without permission from the probation officer. There is absolutely no evidence that the probationer failed to regularly support those for whom he was legally responsible. There is absolutely no evidence that he failed to follow the probation officer's instructions and advice. There is absolutely no evidence that the probationer ever failed to report promptly on the dates required. There is absolutely no evidence that the petitioner was not living a clean and temperate life and the only evidence that impugns his honesty is the hearsay statements of Mr. Neely.

Mr. Neely was present in the court however all of his statements were presented in the form of hearsay statements read by the Chief Probation Officer even though the attorney for the petitioner protested. Appellant's appendix p. 46A.

An assistant United States Attorney was present and all of the witnesses of the petitioner were extensively cross-examined by the assistant U. S. Attorney and the petitioner respectfully submits that if his witnesses were subject to cross-examination by the assistant United States Attorney, then all the witnesses of the probation office should have been subject to cross examination by the attorneys for the petitioner.

Actually hearsay evidence of hearsay evidence was heard by the court and accredited with great importance in the court's order allowing revocation. The Court allowed the chief probation officer to state what a Miss Vera Lee and also a Mrs. Westbrook told Mr. Neely in order to prove that the probationer had made false statements concerning his relationship with Russell Lee who had been apprehended at a distillery. Appellant's appendix pp. 5A, 9A, 10A, 11A.

Without the statement of probation officer Neely there is no evidence that probationer had any interest in the Four-Way Grocery Store. Appellant's appendix p. 6A. Without the statement of probation officer Neely there is no evidence that probationer had any access or control over the barn or building where the farm implements and jars were located on the Benny Slaughter farm. Appellant's appendix pp. 9A, 24A, 25A. Without the statement of Mr. Neely there is no evidence that the probationer owned any farm machinery that was parked around the building. Appellant's appendix p. 9A. Without the statement of probation officer Neely there is no evidence that the probationer stated to Mr. Neely that he met the truck with the cases as related by ABC Officer Smith in Four Oaks on his way from Wilson with his wife. Appellant's appendix p. 46A.

There is absolutely no evidence of violation of State or Federal laws on the part of the petitioner. The court in its findings of fact in the order revoking probation does not disclose any violation of law on the part of the petitioner. It was never shown that the cases on the truck on December 17, 1962, even contained fruit jars and if the truck did contain fruit jars it was never shown that the contents were for an illegal purpose. The Four-Way Grocery was not under demand at the time the used fruit jars were disposed of and there is no evidence that any person at the grocery store disposed of the used fruit jars for the purpose of violating the Internal Revenue Laws. The liquor distillery found on August 9, 1965, was not located on the Benny Slaughter

property and aside from the statement of Mr. Neely there is no evidence that the petitioner was actually on the farm at the time.

When the order of revocation is read as a whole, the conclusion is inescapable that the petitioner's probation was revoked because petitioner made false statements to Mr. Neely and that the statements and also their falsity was presented to the court by hearsay evidence. Appellant's appendix pp. 2A-6A.

There was no evidence of any bad reputation of the petitioner in the community in which he lived since he was placed on probation. In fact all of the evidence of petitioner's reputation in the community in which he lived since his sentence was favorable to him. All of the evidence of bad reputation since the probationary sentence of the petitioner came from officers and pertained to reputation among the officers.

The decision of the court below completely disregards the petitioner's right to have the revocation of his probation based on facts other than hearsay evidence and in order to preserve the petitioner's rights which have been disregarded and to decide an important question of Federal law which has not been, but should be, settled by this court, a review of the decision below is a requisite.

CONCLUSION

For the foregoing reasons a writ of certiorari to review the judgment of the court of appeals for the Fourth Circuit should issue.

Respectfully submitted,

CHARLES FULLER BLANCHARD
8th Floor Wachovia Bank Bldg.
Raleigh, North Carolina
IRVIN B. TUCKER, JR.
8th Floor Wachovia Bank Bldg.
Raleigh, North Carolina
Counsel for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10,290.

United States of America,
Appellee,

versus

Harvey C. Register,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH. ALGERNON L. BUTLER, CHIEF DISTRICT JUDGE.

(Argued April 5, 1966. Decided April 15, 1966.)

Before BRYAN and BELL, Circuit Judges, and BUTZNER, District Judge.

Irvin B. Tucker, Jr., (D. K. Stewart on brief) for Appellant, and William S. McLean, Assistant United States Attorney, (Robert H. Cowen, United States Attorney, on brief) for Appellee.

PER CURIAM:

The revocation of Harvey C. Register's probation was justified, we think, and on his appeal from the consequent commitment, we affirm.

Chiefly, the grievance asserted by the appellant is the acceptance of certain hearsay testimony by the District Court in regard to his breach of the probationary terms. In this there was no error or infringement of Register's rights, and there was ample evidence without it to sustain the revocation. However, as the trial judge is quite aware, there can be injury if heresay plays too great a role in the inquiry, and he will constantly be alert to the frequent untrustworthiness of such proof. Of course, the infractions admitted by the probationer may always be outlined for the Court in hearsay statements.

In the argument on appeal the question arose as to the adequacy of the notice to the probationer of the motion or request for revocation. The present order may not be disturbed on this ground, but it is suggested that always, whatever form the notice takes, a specification be included of the grounds upon which revocation will be sought.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

HARVEY C. REGISTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THURGOOD MARSHALL,
Solicitor General,

FRED H. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys,

Department of Justice,
Washington, D.C., [illegible]

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JURISDICTION

The judgment of the court of appeals was entered on April 15, 1966 (R. 17-18). The petition for a writ of certiorari was filed on May 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether competent evidence supports the district court's discretionary ruling revoking petitioner's probation.

2. Whether petitioner had notice of the charges against him.

STATUTES INVOLVED

18 U.S.C. 3651 provides in pertinent part:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

* * * *

18 U.S.C. 3653 provides in pertinent part:

> When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on proba-

tion. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

* * * *

At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant. At any time within the probation period, or within the maximum probation period permitted by section 3651 of this title, the court for the district in which the probationer is being supervised or if he is no longer under supervision, the court for the district in which he was last under supervision, may issue a warrant for his arrest for violation of probation occurring during the probation period. Such warrant may be executed in any district by the probation officer or the United States marshal of the district in which the warrant was issued or of any district in which the probationer is found. If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in such district.

As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.

STATEMENT

On March 5, 1962, petitioner entered a plea of guilty to a one-count indictment charging a violation of the Internal Revenue laws relating to distilled spirits (26 U.S.C. 7206(4)). He was fined $750 and sentenced to imprisonment for three years, with execution of the prison sentence suspended and petitioner placed on probation for five years (I A.2).[2] On September 30, 1965 (after a hearing held on September 10, 1965), the district court revoked petitioner's probation and sentenced him to a reduced two-year prison term (I A. 2-6). The court of appeals affirmed, *per curiam* (R. 15-16).

1. At the outset of the revocation hearing, Chief Probation Officer W. T. Woodward, Jr., orally detailed to the court the report of petitioner's probation officer. The report may be summarized as follows (I A. 6-11):

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[2] The general conditions of the probation were that petitioner "(a) Refrain from the violation of any state and federal penal laws. (b) Live a clean, honest and temperate life. (c) Keep good company and good hours. (d) Keep away from all undesirable places. (e) Work regularly. When out of work, notify your probation officer at once. (f) Do not leave or remain away from the city or town where you reside without permission of the probation officer. Notify your probation officer at once if you intend to change your address. (g) Contribute regularly to the support of those for whose support you are legally responsible. (h) Follow the probation officer's instructions and advice. The Probation Law gives him authority to instruct and advise you regarding your recreational and social activities. (i) Report promptly on the dates set forth. If for any unavoidable reason you are unable to do so, communicate with your probation officer without delay." (I A. 2).

On February 8, 1965, petitioner had advised probation officer Neely that he had become a part owner of a rural grocery store in Sampson County, North Carolina. Neely told him to be particularly careful in handling jars, sugar and anything else that could be used in the illegal liquor traffic. On March 17, 1965, Neely received information that federal Alcohol Tax agents had visited the store and found approximately 2,500 pounds of sugar and 86 cartons of second-hand half-gallon jugs, most of which bore the label "Tom's Toasted Peanuts," and that they believed petitioner was involved in the illegal liquor traffic. The next day Neely spoke to petitioner about this matter. Petitioner said that he planned to sell the sugar for legitimate uses and that some children "picked up the jars in the neighborhood and that he bought the jars from them." Thereafter, on April 16, 1965, petitioner and his wife advised Neely that the store then contained about 120 pounds of sugar and no jars and that they were no longer handling any jars, but they refused to explain what had happened to those previously seen in the store. Petitioner again insisted that he had purchased "one jar at a time," from neighborhood boys who went around the countryside picking them up.

The report further noted that on August 9, 1965, Neely was advised that an illegal distillery had been seized on property rented by petitioner and that cartons of half-gallon jars bearing the same label as those on the cartons found in the store were discovered in a barn about twenty yards from the still.

Farming equipment (a tractor and cotton picker) and a truck usually operated by petitioner were also found in and around the barn. On August 19, petitioner advised Neely that he had leased the land and had access to the buildings where the farming equipment and jars were found. He "emphatically denied" that he had been to the home of Russell Lee (arrested at the still site in possession of two cases of these jars) any time within the last year. Lee's sister had, on the previous day, advised Neely that petitioner had visited her brother at home "'about a month ago', called him outdoors and engaged in a lengthy conversation with him." According to Neely, petitioner told him that he had nothing to do with obtaining housing for Lee. In a subsequent discussion with the lessors of the property, Neely learned that when Lee arranged to rent the house in which he lived, he was accompanied by petitioner who "did all the talking."

2. Following this report the government called five federal and State agents as witnesses. Federal agent Bryant testified that from January 8, 1965, through April 12, 1965, the owners of the Register grocery store had purchased a total of 13,560 pounds of sugar from various wholesalers; that this was an unusual amount of sugar for a rural store; and that from April 12, 1965, to June 10, 1965, after a "demand letter" [3] had been served on petitioner and his wife, only 1,260 pounds had been purchased from the same

[3] A "demand letter" (see 26 U.S.C. 5291; 26 C.F.R. 173.10) requires any seller to report to the Internal Revenue Service the disposition of all raw materials which might be used in the production of illicitly distilled spirits.

wholesalers (I A. 12-13; II A. 1-2). Another agent testified that in March 1965, he had seen in the store cartons of jars labeled "Tom's Toasted Peanuts" as well as an unusual amount of sugar (I A. 27-28; Tr. 59). An agent who participated in the August 1965 raid testified that the distillery was located on property immediately adjacent to or on property actually leased by petitioner and that agents found cartons of jars bearing the same labels as those seen in the store (I A. 16-18). Before this raid the federal agents had been advised by a reliable informer that the distillery was owned by petitioner (Tr. 23).[4] The agents further testified that they had received "numerous reports from reliable sources" that petitioner had owned many illicit distilleries in the area and that he was on a "state list" as a major liquor law violator (I A. 15, 18, 30, 33). These witnesses were subjected to intensive defense cross-examination. (See, *e.g.*, I A. 18-26, 27-29.)

After this testimony, probation officer Woodward stated to the court that other agents were available whose testimony was cumulative. He then began to inform the court what petitioner had told probation officer Neely about the transfer and delivery of some 250 cases of half-gallon jars in December 1962 shortly after petitioner had been placed on probation. (A federal agent who had surveilled this transaction had previously testified as to petitioner's direct involve-

[4] The agents had similar information from reliable informants as to nearby stills previously raided in February and May 1965 (Tr. 20-21).

ment therein (I A. 31-34).) At this point, defense counsel stated, "Mr. Neely is present. We would prefer that he give his testimony. Of course, I don't know the procedure in this type of hearing." The court responded that it would "hear the report of the probation officer as to what it shows" (I A. 45-46). There was no defense objection. Officer Woodward then advised the court that petitioner had told Neely that he had no knowledge of the 1962 transaction and that it was a "pure coincidence" that he and his wife happened to be at the location in question at the time the jars arrived (I A. 47).

There was additional testimony by government witnesses concerning a June 1964 raid on a distillery near where the distillery was found in August 1965 (see I A. 14, 17, 45; II A. 4-5; Tr. 18-19). When petitioner objected on the ground that the agents who participated in the June seizure were present and could testify, the court said, "Well, let's see what he [agent Bryant] has to say. If it is incompetent, I will disregard it" (II A. 4). Agent Bryant testified that he had been at this distillery on several occasions (although he did not participate in the actual raid), that the still was no more than "ten yards" from where the 1965 still was discovered and that the property on which it was found was then under lease by petitioner (II A. 4-5; Tr. 25).

3. Defense counsel also called nine witnesses, including petitioner's wife, who testified, *inter alia*, that an employee of the store and not petitioner had purchased the jugs from the neighborhood children (I A. 61-68; II A. 23-24). The defense also introduced a

substantial amount of documentary evidence (I A. 52, 57; II A. 11). Petitioner did not testify at the hearing.

ARGUMENT

1. Based on the testimony of the federal agents at the revocation hearing, the district court could fairly find that, during petitioner's probation, he had been in possession of extraordinary amounts of sugar and half-gallon jugs with intent to produce illicit distilled spirits and accordingly had violated a condition of his probation. See *supra*, p. 4, n. 2. The evidence did not have to meet the standard necessary to support a criminal conviction. It has long been settled that the grant or revocation of probation is a statutory privilege resting within the wide discretion of the district court. See 18 U.S.C. 3651; *supra;* see also *Burns* v. *United States*, 287 U.S. 216, 220-223; *Escoe* v. *Zerbst*, 295 U.S. 490, 493; *Broadus* v. *United States*, 317 F.2d 212, 213 (C.A. 5), certiorari denied, 375 U.S. 829; *Yates* v. *United States*, 308 F.2d 737, 738-739 (C.A. 10); *Manning* v. *United States*, 161 F.2d 827, 829-830 (C.A. 5), certiorari denied, 332 U.S. 792.

Petitioner's assertion that the district court's order rested "entirely on hearsay" (Pet. 2, 17) is unsound. As we have shown and as the court of appeals held (Pet. App. 2), the government made out its case from the testimony of live witnesses subject to cross-examination.

The report of probation officer Neely detailed to the court by probation officer Woodward at the outset

of the hearing—a procedure apparently contemplated by the probation statute[5]—was comparable to an opening statement outlining what the government intended to prove. It was, in large measure, substantiated by the direct testimony of the government witnesses. Petitioner should not now be heard to contend that Neely's report was impermissibly given evidentiary weight by the district court since he failed to object to the reading of the report and did not seek to cross-examine Neely, who was present during the entire revocation hearing.[6]

2. It is evident from this record that the petitioner did, in fact, have notice of the charges against him. Defense counsel's searching cross-examination of the government witnesses, his presentation of nine defense witnesses and his introduction of previously prepared items of documentary evidence (See Tr. 125, 132, 155-159) attest to the fact that the defense was fully aware of the charges in advance of the hearing. Nor did counsel seek a continuance or make any as-

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[5] "When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation." 18 U.S.C. 3653.

[6] On one occasion (see *supra*, pp. 7-8), defense counsel stated that he would prefer to have probation officer Neely testify. But counsel raised no objection when the court said he would hear the report as given by Woodward (I A. 31-34). When defense counsel did object to the testimony of agent Bryant concerning a 1964 distillery raid in which that agent had not directly participated, the court ruled that it would disregard any incompetent testimony. The agent then went on to testify as to matters solely within his own personal knowledge (II A. 4-5).

sertion as to lack of notice in the district court. The fact that the issue of notice was first raised on oral argument in the court of appeals indicates that the claim was an afterthought.[7]

We agree, of course, that as a matter of elemental fairness a probationer must be notified of the charges upon which revocation is sought. But such notice need not take any particular form. See *Burns* v. *United States, supra,* 287 U.S. at 222-223. The purpose of a revocation hearing is not to determine the guilt of a probationer with respect to a new criminal offense or to decide on punishment, but to determine whether, in the light of intervening events, the status of an individual already convicted and placed on probation should be changed. Hence notice of the charges in any form is sufficient if it affords the probationer an opportunity at the hearing "to explain away the accusation * * * [and justifies] the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper." *Escoe* v. *Zerbst, supra,* 295 U.S. at 493; see also *Burns* v. *United States, supra;* cf. *Williams* v. *New York,* 337 U.S. 241. The court of appeals in its opinion suggested "that always, whatever form the notice takes, a specification be included of the grounds upon

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[7] The issue of notice is also raised in the petition for a writ of certiorari from the Fourth Circuit's decision in *Ball* v. *United States,* No. 1249, this Term, certiorari denied, June 6, 1966. As we point out in our brief in opposition in *Ball,* the facts of that case also make clear that the probationer was aware of the charges before the crucial revocation hearing. See Brief in Opp., No. 1249, this Term, pp. 5-6.

which revocation will be sought" (Pet. App. 2). A more formal type of notice can thus be expected in the future. However, as the court of appeals concluded, the absence of written notice in this case is not a ground for reversing the district court's order in view of the fact that petitioner was clearly aware of the charges in ample time to prepare his defense.[8]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

June 1966

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[8] Petitioner's argument (Pet. 14-15) that the 1948 amendment to the probation statute providing that after arrest a probationer shall be brought before the court "[a]s speedily as possible" (18 U.S.C. 3653) suggests an intent by Congress to impose a formalized notice requirement finds no support in the relevant legislative history. On the contrary, that history indicates that this was not intended as a substantive change. See H. Rep. No. 1923, 80th Cong., 2d Sess., pp. 2-3.

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